

1994

State of Utah v. Perry McDonald aka Terry Storman : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 940105-CA IN THE UTAH COURT OF APPEALS COURT OF APPEALS

STATE OF UTAH,)	
)	
Plaintiff/Appellee,)	
)	Case No. 940105-CA
v.)	
)	
PERRY McDONALD, a/k/a)	Priority No. 2
Terry Storman,)	
)	
Defendant/Appellant.)	Oral Argument Requested

REPLY BRIEF OF APPELLANT

APPEAL FROM VERDICT, JUDGMENT, CONVICTION AND
SENTENCE FOR ONE COUNT OF AGGRAVATED ROBBERY, A
FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE
ANN. § 76-6-302 IN THE SECOND JUDICIAL DISTRICT
IN AND FOR DAVIS COUNTY, THE HONORABLE RODNEY S.
PAGE PRESIDING.

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IN THE UTAH COURT OF APPEALS

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ARGUMENT

1. BECAUSE OF THE TRIAL COURT'S FAILURE TO PROPERLY CONDUCT A THOROUGH AND COMPREHENSIVE INQUIRY AND COLLOQUY, DEFENDANT DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE HIS RIGHT TO COUNSEL.

In its Brief, the State acknowledges that in cases such as the instant case a trial court has a duty "to determine if this waiver is a voluntary one which is knowingly and intelligently made." *State v. Frampton*, 737 P.2d 183, 187 (Utah 1987). Furthermore, it is well-settled that a defendant in such circumstances as the instant case "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta v. California*, 422 U.S. 806, 835 (1975) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). "Ideally, the trial judge should conduct a thorough and comprehensive formal inquiry of the defendant on the record to demonstrate that the defendant is aware of the nature of the charges, the range of allowable punishments and possible defenses, and is *fully informed of the risks of proceeding pro se*." *United States v. Willie*, 941 F.2d 1384, 1388 (10th Cir. 1991), *cert denied*, 502 U.S. 1106 (1992) (emphasis added); see also *Frampton*, 737 P.2d at 187 (recognizing, generally, that the trial court's advise to a defendant about the dangers and disadvantages of self-representation "can only be elicited after penetrating

self-representation "can only be elicited after penetrating questioning by the trial court" to insure that "defendants understand the risks of self-representation") (emphasis added)).

In the instant case, the trial court failed to adequately question or advise Defendant so as to make him aware of the dangers and disadvantages of self-representation (see R. 96-98, Jury Trial Transcript (Volume I)); see also Brief of Appellant, pp. 28-35. Rather, the trial court focused almost solely on Defendant's background (*id.*). Instructive of the trial court's failure is *State v. Ruple*, 631 P.2d 874 (Utah 1981), where after the defendant choose to represent himself, the trial court briefly explained to the defendant the procedure to be followed for the balance of the trial. *Id.* at 875. In the course of reversing the trial court's determination of waiver and remanding for a new trial, the Utah Supreme Court emphasized that the trial court "did not discuss with the defendant the dangers and disadvantages of self-representation. [The trial court] did not advise the defendant that it is generally advisable to have a lawyer who is skilled and trained in the law, and [it] did not point out to the defendant any of the hazards he may encounter by acting pro se." *Id.* at 876; *Cf. State v. Drobek*, 815 P.2d 724, 730, 732 (affirming trial court's determination of waiver due to the record wherein trial court's "careful colloquys" with the

defendant followed the points set forth in *Frampton* "in essence if not verbatim"); and *State v. Dominguez*, 564 P.2d 768 (Utah 1977) (affirming the defendant's waiver of the right to the assistance of counsel in light of the defendant's being fully advised of the dangers and disadvantages of proceeding without the aid of an attorney and the trial court's meticulous questioning of the defendant). Any discussion or analysis of *Ruple* is noticeably absent in the State's brief.

Because the trial court's failure, among other things, to discuss with Defendant the dangers and disadvantages of self-representation, this Court is unable to assess, on appeal, whether Defendant validly waived his constitutional right to the assistance of counsel. See *State v. Bakalov*, 862 P.2d at 1355 (citing *Bakalov*, 849 P.2d at 637); see also *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8, 104 S.Ct. 944, 950 n.8 (1984) ("Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to "harmless error" analysis).

Finally, by pointing to isolated points in the transcript of the trial, the State argues that Defendant's performance was "impressive" and that therefore a knowing and intelligent waiver of the right to counsel was made. See Brief of Appellee, pp. 15-16. The State,

however, neglects to recognize that there are several instances during the proceedings evidencing Defendant's utter confusion. For example, at one point during that first day of the jury trial, after a lengthy discussion between the trial court and counsel concerning side bar conferences and whether or not proper *Miranda* warnings had been administered by the police in the instant case, Defendant interjected with the following comment: "Your Honor, I don't know really about what all of these big words is going on, but the last officer he did not read me my *Miranda* rights at all. He just went right into questions." (R. 308, lines 18-21, Jury Trial Transcript (Volume I)). Nothing else was mentioned about this during the trial. Another example is that on the second day of the jury trial, while Defendant presented his case-in-chief and attempted to refer to a police report, the following exchange took place:

MR. McDONALD: I would like to show this paper, this police report to the jury.

THE COURT: It's not offered, you can't show it to them, Mr. McDonald.

MR. McDONALD: I would like to refer to the police report. Can I?

THE COURT: You cannot refer to the police report unless you do it through the witness who wrote it.

MR. McDONALD: Is that witness here?

THE COURT: I don't know who wrote it.

MR. McDONALD: It says Clearfield Police Department.

THE COURT: That doesn't tell you who wrote it, which of the officers wrote it. At any rate, you can't use it with this witness. You've got to use it with some other witness.

MR. McDONALD: All right.

(R. 400-401, Jury Trial Transcript (Volume II)). Thereafter, Defendant did not attempt to refer to the police report and there is no indication in the record that standby counsel attempted to assist Defendant in referring to the police report as evidence. Probably the most obvious example lack of knowledge and experience is the following exchange between Defendant and the trial court during the Pretrial Hearing in the instant case:

MR. ALBRIGHT: Mr. McDonald had a question for the Court.

THE COURT: Yes.

MR. McDONALD: Yes. I would like to know what kind of law am I standing in. Is this a constitutional right or what is this, just a *Maritime law* or *what*?

THE COURT: It has nothing to do with Maritime laws. You are under the laws of the State of Utah which are statute in nature and guaranteed by both the Constitution of this State and the United States.

MR. McDONALD: All right.

(R. 55-56, Transcript of Pretrial Hearing) (emphasis added).

2. THE TRIAL COURT AND THE PROSECUTOR BREACHED THEIR DUTY TO DEFENDANT BY ALLOWING FORMER TRIAL COUNSEL TO BE APPOINTED AS STANDBY COUNSEL.

In its argument concerning standby counsel, the State fails to recognize that when a trial court appoints standby counsel in cases such as this, both the court and the prosecutor have a duty to investigate the apparent conflict of interest further and not to appoint trial counsel that appears to have an apparent substantial conflict of interest. See Brief of Appellant, pp. 41-46. To do otherwise, would make the constitutional right to self-representation an empty right at best. See *State v. Frampton*, 737 P.2d 183, 187 (Utah 1987) (holding that an accused's right to conduct his own defense "*must be respected and guarded by the courts in harmony with the right to assistance of counsel, also guaranteed by the sixth amendment*") (emphasis added); *Faretta v. California*, 422 U.S. 806, 835 n.46 95 S.Ct. 2525 (1975) (recognizing the appointment of standby counsel to assist a defendant in exercising the right to self-representation); and *State v. Bakalov*, 862 P.2d 1354, 1355 (Utah 1993) (urging the trial court, upon remand, "to appoint standby counsel to preserve [the defendant's] *right to self-representation and to preclude subsequent claims of lack of waiver or ineffective assistance of counsel*") (emphasis added). As is indicated by the argument in Defendant's brief, as well the previously cited cases,

the right to self-representation is well-established by United States Supreme Court and Utah case law. By way of argument in its brief, the State would have this Court believe that Defendant's argument simply revolves around the appointment to standby counsel. Not so; Defendant's argument is substantially premised upon the right to self-representation and the duty of the trial court and prosecutor to protect that right, especially when, as in the instant case, there is an obvious and significant potential conflict of interest between the defendant and appointed trial counsel and trial counsel is subsequently appointed as standby counsel. See *Wood v. Georgia*, 450 U.S. 261, 272 n. 18, 101 S.Ct. 1097, 1104 n.18 (1981) (stating that a conflict situation that is not addressed by the trial court requires reversal) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 347, 100 S.Ct. 1708, 1717 (1980)).

Finally, the State argues that Defendant must establish that standby counsel labored under an actual conflict of interest. See Brief of Appellee, p. 19-20. However, in *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097 (1981), the United States Supreme Court stated that *Sullivan* mandates a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.'" *Id.* at 272 n.18, 101 S.Ct. at 1104

n.18 (emphasis in original) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 347, 100 S.Ct. 1708, 1717 (1980)).

CONCLUSION

Based on the foregoing, Defendant respectfully asks that the Court reverse his conviction and remand the case for a new trial so that Defendant might be receive, among other things, proper advise as to the dangers and disadvantages of self-representation for a valid waiver and, if Defendant chooses to represent himself, so that the conflict of interest issue can be adequately addressed and resolved to preserve Defendant's right to self-representation.

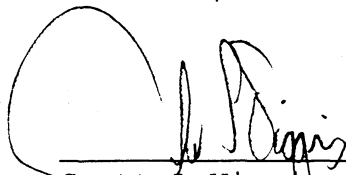
STATEMENT REGARDING ORAL ARGUMENT AND METHOD OF DISPOSITION

Defendant requests oral argument inasmuch as oral argument will materially enhance the decisional process due to the complex and significant issues in the instant appeal dealing with the constitutional right to effective assistance of counsel, which is a matter of continuing public interest, and which case involves issues requiring further development in the area of criminal law. Counsel for Defendant further requests that the method of disposition of the instant appeal be by opinion designated by the Court "For Official

Publication" for purposes of precedential value to aid defense counsel.

RESPECTFULLY SUBMITTED this 2nd day of May, 1996.

HOLMGREN, ARNOLD & WIGGINS, L.C.

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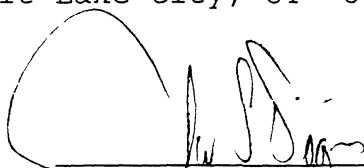
Scott L Wiggins

Defendants for Defendant

CERTIFICATE OF MAILING

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed two (2) true and correct copies (to each of the following) of the foregoing Reply Brief of Appellant, postage prepaid, to the following, on this 2nd day of May, 1996.

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